No. 12001

UNITED STATES

Court of Appeals

FOR THE NINTH CIRCUIT

GENERAL INSURANCE COMPANY OF AMERICA,
a Corporation,

Appellant,

vs.

HENRY O. LINK, E. W. ELLIOTT and O. L. GRIMES,

Appellees.

BRIEF OF APPELLEES

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HONORABLE ROGER T. FOLEY, *Judge*

BOGLE, BOGLE & GATES
STANLEY B. LONG
THOMAS L. MORROW
Proctors for Appellees

Office and Post Office Address:
603 Central Building,
Seattle 4, Washington.

FARWEST, SEATTLE

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STATEMENT OF THE CASE

This is an appeal from a final decree in admiralty entered in favor of appellees in the United States District Court for the Western District of Washington.

The appellees as libelants below brought this action as assureds under a certain marine insurance policy issued by appellant, General Insurance Company of America, respondent below.

The policy insures the *M/V Eastern Prince* against war risk. The policy specifically insures the risks excluded by the usual F.C. & S. Warranty (F.C. & S. Clause, Exhibit A, R. 22) of a marine policy. Thus the policy insures the *M/V Eastern Prince* against loss and damage as "a consequence of hostilities or warlike operations."

The *M/V Eastern Prince* sustained loss and damage as a result of a collision with the *U.S.S. Roustabout* on May 11, 1942, in the agreed sum of $11,031.29.

The basic question on appeal is whether the loss and damage so sustained is recoverable under the insurance policy issued by the appellant insuring the vessel against war risk. This is determined by answering the question: Was the loss and damage to the *M/V Eastern Prince* as a result of her collision with the *U.S.S. Roustabout* the consequence of a warlike operation?

On appellant's exceptions to the sufficiency of the libel to state a cause of action, District Judge Bowen overruled such exceptions and held that under the allegations of the amended libel the loss and damage to the *M/V Eastern Prince* was covered by the war risk policy issued by appellant. Judge Bowen further found (1) the *U.S.S. Roustabout* at the time of collision was engaged in a warlike operation and (2) the loss and damage occasioned to the *M/V. Eastern Prince* was a consequence of the warlike operation in which the *U.S.S. Roustabout* was then engaged. See *Link, et al v. General Insurance Company of America,* (D.C. Wash. 1944) 56 F. Supp. 275, 1944 A.M.C. 727; 77 LL.L. Rep. 431 (England).

The case came on for trial on July 16, 1947, before District Judge Roger T. Foley, who, finding in favor of the

appellees, concluded (1) that the loss and damage to the *M/V Eastern Prince* occasioned by collision with the *U.S.S. Roustabout* occurred by reason of the mutual fault of both vessels (2) that the *U.S.S. Roustabout* at the time of collision was engaged in a warlike operation and (3) that the loss and damage to the *M/V Eastern Prince* so occasioned was a consequence of a warlike operation and hence covered under the war risk policy issued by appellant insuring risks excluded by the F.C. & S. clause.

The facts of the case with respect to the character and services of the *U.S.S. Roustabout,* her functions and war duties, are simple and not in serious dispute and may be briefly stated as follows: The *U.S.S. Roustabout* was a duly commissioned Naval Tanker of the United States Navy, manned by Commissioned Officers and enlisted personnel of the United States Navy, armed with a 3-inch gun on the stern; two 50-caliber machine guns on the bridge, and two 20-millimeter guns forward. She was engaged in a continuous shuttle service carrying petroleum products between Naval war bases of supply in Seattle, Washington, and active war bases in the Territory of Alaska for the United States Navy in time of war for use of combat surface vessels and combat aircraft of the United States Navy and Coast Guard. In connection with such shuttle service she also carried Navy bombs, ammunition, torpedoes and munitions of war and other dry cargo. On her return trips while engaged in such

shuttle service she would return defective ammunition, empty oil drums, empty torpedo cases, damaged airplane parts and other Navy cargo. She was not employed as a merchant vessel or in commercial operations. She carried no commercial cargo or civilian passengers, but was operated solely and exclusively by the U. S. Navy in time of war in the aforesaid shuttle service.

Judge Foley expressed his views orally both as to the proposed findings and the law (R. 222-226) and after considering exhaustive briefs presented by both parties rendered a written decision (R. 41). So far as is material to this appeal, Judge Foley found:

> "3. That on May 11, 1942, and for some time prior thereto, a state of war existed between the United States of America and the Empire of Japan and on said date, while said vessel, the Eastern Prince, was proceeding on a voyage from the Port of Seattle, Washington, to Prince Rupert, first port of call, with supplies and equipment for the Alaska Road up the inside passage to Alaska for the Elliott Steamship Company, and while off Campbell River Bluff opposite Campbell River was in collision with the United States tanker Roustabout; that at the time of said collision the USS Roustabout was a duly commissioned naval vessel of the United States of America employed solely for naval purposes as a regularly commissioned tanker of the United States Navy Department and officered by commissioned officers of the United States Navy and manned by a United States Navy crew, and armed with anti-aircraft guns and other armaments and ammunition for use in connection therewith. That the USS Roustabout at the time of said collision was engaged

in her aforesaid public employment and operated in connection with the prosecution of said war in the military and naval service of the United States of America in the transportation of military and naval supplies, to-wit, fuel oil, gasoline and other petroleum products, between military and naval bases on the west coast of the United States of America to military and naval bases of the United States in the Territory of Alaska for use by combatant naval vessels and aircraft of the United States of America; and that on southbound trips from said naval bases in the Territory of Alaska, the said USS Roustabout engaged in carrying cargo consisting of freight offered by the Navy or Coast Guard, empty containers, oil drums, empty acetylene and oxygen tanks, damaged airplane motors, damaged airplanes, trucks and automobiles, and at the time of said collision, the said vessel had aboard water ballast and miscellaneous dry cargo of the nature just above described.

"4. That the site of the collision is a narrow channel under the International Rules.

"5. That at the time of said collision the USS Roustabout was at fault as follows:

(a) Failing to keep to the right of the channel;

(b) Failing within sight of the Eastern Prince to indicate a change of course on her whistle;

(c) Failing to keep a proper lookout in that the lookout aboard the Roustabout after sighting the red light of the Eastern Prince took no action concerning same and failed to notify the officer on the bridge of the whereabouts of the Eastern Prince.

"7. That libelants suffered loss for particular and general average charges and disbursements occasioned by said collision and the damages resulting to the East-

ern Prince in consequence thereof in the sum of $11,-031.29." (R. 47-49.)

The findings of ultimate fact that the collision and damage to the *M/V Eastern Prince* was a consequence of the *Roustabout's* warlike operation are contained in Judge Foley's Conclusions of Law appearing as follows:

> "1. That at the time of the collision between the USS Roustabout and libelants' vessel, Eastern Prince, the Roustabout was a duly commissioned naval vessel of the United States employed solely for naval tanker purposes, officered and manned by naval officers and crew and operated by the United States Navy and engaged in warlike operations.
>
> "2. That the collision and damage resulting therefrom to libelants' vessel, Eastern Prince, was a consequence of Roustabout's warlike operations.
>
> "3. That the said collision occurred by reason of the mutual fault of both vessels." (R. 49, 50.)

The appellant's assignment of errors numbers 1, 2, 3, 4, 5, 6, 7 and 9 raises the principal question:

Was the loss and damage to the *M/V Eastern Prince* occasioned by the collision with the *U.S.S. Roustabout* the consequence of a warlike operation?

Appellant's assignment of errors numbers 6 and 7 raises the question whether there is any evidence to support the finding of fault on the part of the *Roustabout,* it being necessary to show that the *Roustabout* was at least partially at

fault to support the conclusion that the collision and damages to the *Eastern Prince* was a consequence of a warlike operation. If the collision resulted from the sole or partial fault of a vessel engaged in a warlike operation, then the case is one of war risk. If the collision resulted from the sole fault of a vessel not so engaged, the case is one of marine risk. The District Court found the collision resulted from the mutual fault of both vessels and a consequence of the warlike operation in which the U.S.S. *Roustabout* was then engaged.

ARGUMENT

I. The Collision of the U.S.S. *Roustabout* with the Motor Vessel *Eastern Prince* and Loss and Damage Resulting Therefrom Were Consequences of the Warlike Operations of the U.S.S. *Roustabout*.

A. *American Courts Follow English Decisions on Questions of Marine Insurance Law.*

There is a dearth of American cases on construction of the terms "consequences of hostilities and warlike operations" as those terms are used in marine policies of insurance while English decisions have dealt with and fully developed the subject over a period of many years. Thus the American courts have found it of paramount importance in matters of marine insurance law to be guided by such English decisions.

In the first American case (arising out of the First World

War) involving this question, Justice Holmes considered it necessary to keep in harmony with the marine insurance laws of England. He stated:

> "There are special reasons for keeping in harmony with the marine insurance laws of England, the great field of this business." *Queen Insurance Co. v. Globe & Rutgers Fire Insurance Company*, 263 U.S. 487, 68 L. Ed. 402 (1923).

Uniformly our courts have been guided by the foregoing principle as illustrated in the following cases.

Justice Augustus N. Hand in *Mellon v. Federal Ins. Co.*, 14 F. (2d) 997 (1926—So. Dist. N. Y.) at p. 1004, stated:

> "Not only does the reasoning of the English decisions seem more convincing, but it is particularly desirable in cases of marine insurance that the decisions of the American and English courts should be in harmony."

Justice Swan in *New York & Oriental SS Co. v. Automobile Ins. Co.*, 37 F. (2d) 461 (CCA 2nd, 1930), p. 463, stated:

> "The plaintiff relies upon a recent decision of the House of Lords. * * * If that august tribunal has laid down a controlling principle, we should hesitate to depart from it; for in matters maritime, and especially insurance, the importance of conformity between the English law and our own has been often emphasized. * * *"

Judge Foster in *Aetna Ins. Co. v. Houston Oil Transport Co.* (1931), 49 F. (2d) 121 (CCA 5th), p. 124, stated:

"Federal courts look to the laws of England for guidance in matters of marine insurance and follow them unless, as a matter of policy, a different rule has been adopted. *Queen Ins. Co. v. Globe Ins. Co.*, 263 U.S. 487, 44 S. Ct. 175, 68 L. Ed. 402. * * *"

Judge Swan in the *Gallileo,* 54 F. (2d) 913 (CCA 2nd, 1931) p. 915 stated:

"Our statute was taken from an earlier British Act (26 Geo III c. 86), as was pointed out in *Norwich & N. Y. Trans. Co. v. Wright,* 80 U.S. (13 Wall.) 104, 117, 20 L. Ed. 585, and the present British statute (57 and 58 Vict. c. 60 Sec. 502, par. (1) is very similar to our own. Hence the construction put upon their statute by the British Courts has a peculiar significance, additional to any weight to be accorded to the general desirability of uniformity in British and American law in matters maritime, a consideration noted in *Queen Ins. Co. v. Globe & Rutgers Ins. Co.*, 263 U.S. 487, 493, 44 S. Ct. 175, 68 L. Ed. 402. * * *"

Judge L. Hand in *Aetna Ins. Co. v. United Fruit Co.*, 92 F. (2) 576 (2 CCA) (1937), p. 580 stated:

"* * * We do not forget that we are not to depart from English maritime law, when we can help it * * *"

Judge Hulbert in the *Shodack,* 16 F.S. 218 (So. Dist. N. Y. 1936) at p. 219 stated:

"In *Queen Ins. Co. v. Globe & Rutgers Fire Ins. Co.* (The Napoli), 263 U.S. 487, 44 S. Ct. 175, 176, 68 L. Ed. 402, Mr. Justice Holmes said: 'There are special reasons for keeping in harmony with the marine insurance laws of England, the great field of this business.' "

In *Aetna Insurance Co. v. United Fruit Co.*, 1938 A.M.C.

707, 304 U.S. 430, Mr. Justice Stone in delivering the opinion of the Court, stated:

> "We recognize that established doctrines of English maritime law are to be accorded respect here * * *."

The District Court in this case gave effect to the foregoing principle of necessity in following English decisions, *Link v. General Insurance Company* (1944 D.C. Wash.) 56 F. Supp. 275, *Link v. General Insurance Company* (1948 D.C. Wash.) 77 F. Supp. 977, (R. 41) Judge Bowen in his decision stated:

> "In approving the policy of applying in American courts the English court decisions, Justice Holmes, for the Supreme Court in the *Queen Ins.* case, finally gave effect to the conclusion of expediency, reached reluctantly by Judge Hough of the District Court and affirmed by the Second Circuit Court of Appeals, that the best interests of all concerned in the war risk phase of the world wide marine insurance field require that American courts follow English court decisions because, as Justice Holmes said: 'There are special reasons for keeping in harmony with the marine insurance laws of England, the great field of this business * * *.' Approval of that policy has been in varying form stated also in the following federal court cases: *Mellon v. Federal Ins. Co.*, D.C., 14 F. 2d 997, 1004; *New York & Oriental S.S. Co. v. Automobile Ins. Co.*, 2 Cir., 37 F. 2d 461, 463; *Aetna Ins. Co. v. Houston Oil & Transport Co.*, 5 Cir., 49 F. 2d 121, 124; *The Galileo*, 2 Cir., 54 F. 2d 913, 915; *Aetna Ins. Co. v. United Fruit Co.*, 304 U.S. 430, 438, 58 S. Ct. 959, 82 L. Ed. 1443."

Judge Foley on the merits likewise followed English decisions. (R. 42.)

B. ***The Construction of the Terms "Consequences of Hostilities or Warlike Operations" Contained in English Charters and Appearing in the F. C. & S. Clause of Marine Insurance Policies Are Similarly Construed.***

The terms "consequences of hostilities or warlike operations" appearing in English charter provisions and in the F. C. & S. Warranty of marine insurance policies are similarly construed by decisions. Lord Wright in the *Coxwold* (*Yorkshire Dale Steamship Co. Ltd. v. Minister of War Transport*), House of Lords 1942, 58 The Times L.R. 263, (1942) A.C. 691, stated:

> "It is true that these words (the consequences of hostilities or warlike operations) occur in the present and similar cases in a charter party entered into between the Crown and the owner of the requisitioned ship, but they are to be construed as if they occurred in a policy, because they form part of a contract of indemnity which is in truth a contract of marine insurance."

C. ***Under English Decisions the Law Is Now Well Settled in Regard to What Constitutes a War or Marine Risk Within the Meaning of the Terms "Consequences of Hostilities or Warlike Operations" As Those Terms Are Used in the F. C. & S. Warranty of a Marine Insurance Policy.***

There has been a vast development in the decisions of the English courts upon the question of what constitutes a

marine or war risk under a marine insurance policy containing a F. C. & S. Warranty and in construing the terms "consequences of hostilities or warlike operations." The law on construction of these terms is now well settled. Lord Atkin recognizing this fact in the *Coxwold, supra,* stated:

> "* * * Rightly or wrongly nearly every question that can arise on the controversy between marine and war risk has been settled to the great convenience of the shipping world, if not with the approval of all their advisers. If the warlike operation includes the direction of the war vessel through the water from one war starting point to another war destination it seems to remain true that almost every casualty to a ship during such an operation will be the consequence of a war operation. * * *"

D. *English Cases on the Construction of the Terms "Consequences of Hostilities or Warlike Operations."*

In order to have a full understanding of the question of war versus marine risk, it is necessary to review the developments of English cases on the subject.

(1) The *Coxwold case.* (House of Lords, 1942.)

The leading case and the highest expression of thought on the subject of war risk versus marine risk under marine insurance policies is the *Coxwold* (*Yorkshire Dale Steamship Co. Ltd. v. Minister of War Transport*), House of Lords 1942, 58 The Times Law Reports 263, (1942) A. C. 691. The *Coxwold* was requisitioned by the British Minister of War Transport and insured by her owners against marine

perils excepting war risk (F. C. & S. warranty). The Government accepted those risks excluded by the F. C. & S. warranty in the marine policies, including the risk of "all consequences of hostilities and warlike operations." While on a voyage carrying military supplies (cargo of petrol in tins) from Greenock to Narvik, in May 1940 the *Coxwold* stranded on Damsel Rock. There was no negligent navigation on her part and the course steered seemed to be a safe one and her course had been previously altered under Naval orders to avoid what was thought to be an enemy submarine. Since the Coxwold was carrying war supplies from one war base to another war base it was conceded she was thus engaged in a warlike operation. The case held that the proximate cause of the stranding resulting in the loss of the Coxwold was the warlike operation (i.e., carrying military supplies from one war base to another) in which the vessel was then engaged and was thus due to a risk excluded by the marine policies (i.e. F. C. & S. clause) and assumed by the Crown under the charter.

Lord Porter traced the development of the subject in the *Coxwold,* stating:

> " 'Warlike operations' has generally been considered a phrase of wider meaning than 'hostilities,' and it will, I think, suffice to reach a conclusion whether the loss of the Coxwold was due to risks included in the first-mentioned phrase. Some considerable guidance has been afforded to your Lordships by previous decisions of this

House and one can, I think, tabulate certain conclusions which have finally been reached.

"(1) In this as in every other insurance problem the proximate cause is alone to be looked at. *Ionides v. Universal Marine Insurance Company* (supra). (2) But the proximate cause is not necessarily the nearest in point of time; it is the dominant cause. *Leyland Steamship Company, Limited v. Norwich Union Fire Insurance Society* (34 The Times L. R. 221; (1918) A.C. 350), *Samuel v. Dumas* (40 The Times L. R. 375; (1924) A.C. 431). (3) In the case of a ship proceeding on a voyage which is not itself a warlike operation, absence of lights, sailing in convoy, and zigzagging are not separately or in combination a warlike operation, nor indeed is it a warlike operation to follow the course set by the naval officer in charge of the convoy. *The Petersham* and *The Matiana* (36 The Times L. R. 791; (1921) 1 A.C. 99). (4) The dimming or extinguishing of a shore light is a warlike operation, but if a ship engaged in a mercantile operation goes ashore because she is out of her reckoning, she is not lost by the warlike operation merely because she would most probably have realized and avoided the danger had the light been seen. *Ionides v. Universal Marine Insurance Company* (supra). (5) A ship carrying war stores from one war base to another is engaged on a warlike operation. *The Geelong* (39 The Times L. R. 133; (1923) A.C. 191). (6) A collision caused by a ship so engaged is caused by the warlike operation. *Attorney-General v. Ard Coasters* (37 The Times L. R. 692; (1921) 2 A.C. 141). (7) A collision solely caused by a ship engaged on a mercantile adventure is not caused by a warlike operation even though that ship collides with or is struck by one engaged on a warlike operation. *The Clan Matheson* (45 The Times L.R. 408; (1929) A.C. 514). (8) If the collision be caused both by the ship so engaged and by one not so engaged so that both were effective causes of the disaster the consequent loss is due to the

warlike operation. *Board of Trade v. Hain Steamship Company* (45 The Times L. R. 550; (1929) A.C. 534). (9) The collision if due in whole or in part to the action of the ship engaged in a warlike operation does not cease to be caused by the warlike operation by reason of the fact that that action is negligent. *The Warilda* (39 The Times L. R. 333; (1923) A.C. 292)."

Lord Porter concluded that:

> "The logical conclusion of these observations would seem to be that, in a case where the warlike operation consists in passing from one war base to another, any accident due to proceeding between the starting and finishing points is caused by the warlike operation * * *
>
> "* * *
>
> "* * * *Stranding, it is true, is normally a marine risk just as a collision is, but it may nevertheless be effectively caused by a warlike operation where that operation is the proceeding from one war base to another and the stranding takes place as a result of so proceeding.*" (Emphasis supplied.)

Lord Wright in reaching his conclusion that the stranding was proximately caused by the Coxwold's warlike operation, said:

> "* * * The warlike operation was, as it were, an umbrella which covered every active step taken to carry it out, including the navigation, the course and helm action intended to bring the vessel to the position required by the warlike operation, *and that none the less because accident or mischance or negligence lead to stranding or collision.* * * *" (Emphasis supplied.)

Lord Atkin in the *Coxwold,* recognizing that collision

damages caused by a vessel engaged in a warlike operation were a consequence thereof, said:

> "* * * if in the course of a warlike operation the direction of the ship's course against another ship is a consequence of a warlike operation, *Attorney-General v. Ard Coasters* (37 The Times L. R. 692; (1921) 2 A.C. 141), *it is surely impossible* to distinguish the case where the course of the ship is directed against a rock, and this whether negligently or without negligence, and whether the ship is deflected by tide, or currnt or wind. * * *" (Emphasis supplied.)

(2) The *Geelong-Bonvilston*, 39 The Times L.R. 133; (1923), XIII Ll. L. Law Rep. 455, held that the transportation of war material from one war base to another is a "warlike operation" within the meaning of that term in a policy of marine insurance.

The facts were: The *Geelong* requisitioned by the Australian Government for transportation of war material was at the time of collision transporting general cargo from Port Said to Gibraltar. The *Bonvilston,* requisitioned by the British Government, was carrying ambulance wagons and other Government stores from Mudros to Alexander. The collision occurred without negligence on the part of either vessel and during the first world war. The *Bonvilston* was *held* to be engaged in a warlike operation within the terms of the charter party in effect insuring the *Geelong* against all consequences of warlike operations. The Lord Chancellor stated:

"* * * The expression (i.e. 'warlike operation') is not confined to actual combatant operations against the enemy, whether by way of attack or of defense; for in the case of Richard de Larrinaga (*Liverpool and London War Risks Insurance Assn. v. Marine Underwriters of steamship Richard de Larrinaga,* (1921) 2 A.C. 141) a warship on her way to pick up a convoy was held by this House to be engaged in a warlike operation. Indeed, it has been said that almost any movement of a warship in the course of her duties may be included in the phrase 'warlike operations.' *Probably the phrase includes all those operations of a belligerent power or its agents which form part of or directly lead up to those processes of attack and defense which are of the essence of war.* Thus, as was said by Lord Atkinson in the *Petersham* case, the transfer of the combative forces of a belligerent power from one area to another for combative purposes would be a warlike operation; and the same may, I think, be said of the transport in like manner of guns or munitions of war. *Nor, in my opinion, can any valid distinction be drawn in this respect between munitions of war and the materials for equipping a fighting force, such as saddles for the cavalry, field kitchens for the infantry, or ambulance wagons for the wounded in battle. All these things are an essential part of the equipment of an army in the field, and to transport them to an area of war is a part of the warlike operations conducted in that area not less essential than the provision of men, guns, rifles, or ammunition."*

"* * * In the absence of any circumstances tending to put a different colour upon the transaction, *the carriage in time of war of ambulance wagons and other Government stores from one war base to another war base is carriage for the purpose of the war.* It is immaterial whether the wagons and stores are being taken to a base for the purpose of warlike operations to be conducted from that base, *or are being fetched away from a base* because the warlike operations conducted from it

have ceased. In either case the carriage is part of a military operation." (Emphasis supplied.)

In the *Coxwold* Lord Wright, commenting upon the reasoning of the *Geelong-Bonvilston case,* stated:

> *"The next development came through treating a merchant vessel as being on the same footing as a war vessel, simply because of the cargo she was carrying and the character of the place of departure or destination.* Once it was determined that she was to be treated as on this footing it did not matter that the sea peril, collision or the like, was, apart from the special character attributed to her, merely an ordinary marine casualty, the occurrence of which was in no way influenced by the nature of her cargo, or indeed her ports of sailing or destination, except in the sense that she was being navigated on the particular voyage. *This was a big step, which was taken once* for all in *Australian Commonwealth Shipping v. P. & O. Branch Service,* The *Geelong-Bonvilston* * * *" (Emphasis supplied.)

(3) The *Ardgantock—The Richard de Larrinaga,* (1921) 37 The Times Law Reports 692, VII Lloyds List Law Reports, 150, decided jointly.

The House of Lords in these two decisions considered two cases involving collisions between merchant vessels and men-of-war. In *The Ardgantock,* a merchant ship chartered to the Government collided with the British destroyer Tartar when the latter vessel turned on her beat while patroling for submarines. Neither vessel was found at fault. The decisions in the lower court and the Court of Appeals holding the damage to the merchantman was a war risk, as a consequence

of warlike operations, was confirmed by the House of Lords.

In *The Richard de Larrinaga,* a merchant ship insured against war risk while in convoy at night without lights, came into collision with the British warship H.M.S. Devonshire, which was on her way to meet another convoy which she was to escort.

Viscount Finlay said:

> "* * * It is said there may be great difficulties in saying when the progress of operations begins. A nice question may arise, but it seems to me perfectly plain that, *when a war vessel is actually at sea and is there because she is under orders to go to a particular spot to undertake a warlike operation, whatever its nature may be, she is engaged in the course of that warlike operation, because she is doing that which is necessary to get to the spot where the actual thing is to be done.* * * *" (Emphasis supplied.)

(4) The *Warilda—The Adelaide Steamship Co., Ltd., v. Crown,* 39 The Law Times Reports 333, Vol. XIV Lloyds Law Reports 549, 1923 A..C 292.

In this case the *Warilda,* under charter to the British Government, was an army hospital ship on her way from Havre to South Hampton with wounded men, doctors and nurses, navigating at night. She collided with the *Petingaudet,* a merchant vessel carrying general cargo (coke). *The Warilda was at fault.* The decision of the Court of Appeals that the damage to the Warilda was a war risk and the consequence of warlike operations, was affirmed in the

House of Lords. On the question of the Warilda being engaged in a warlike operation, Lord Shaw stated:

> "* * * It appears accordingly to be beyond question that the ambulance transport Warilda was part of the naval forces of the country.
>
> "* * * I do not have any doubt that at the time of the collision the Warilda was sailing in the course of warlike operations. * * *"

In the *Warilda* it was contended that negligence was the proximate cause of the loss and damage and for that reason was not a consequence of a warlike operation. The House of Lords overruled this contention and held that the loss and damage was a result of warlike operations notwithstanding the negligence of the Warilda, her negligence being immaterial.

In *the Warilda,* Lord Shaw stated:

> "* * * I do not have any doubt that at the time of the collision the Warilda was sailing in the course of warlike operations. It was argued that while this might be so, yet the collision was not a consequence of these operations. I do not think that in the state of the authorities this contention can be sustained. It was admitted that the collision must be attributable to one of two things, either to the warlike operations or to a sea risk, and the enumeration of sea risks even under the requisition of the charter-party no doubt includes 'collision . . . or any other course arising as a sea risk.' It seems out of the question to infer from this language that all collisions are ex necessitate sea risks. And, in short, it appears to me that when a ship requisitioned by the naval authorities and actually engaged in what

I have explained to be a warlike operation comes into collision with another vessel, under, of course, the exceptional conditions of speed, lights doused and such warlike operations, the category of war risk cannot be changed into the category of sea risk by reason of the negligence of those engaged in conducting these operations. The conduct may have been faulty, but it was a warlike operation although faultily conducted. *Faulty navigation on the part of one ship or the other is, of course, the determining factor of responsibility as between the two ships, but, in my opinion, it it not a legitimate factor for the other purpose which is here attempted, namely of converting a war risk into a sea risk. Once the category of warlike operations attaches to the movements of the vessel, that category must continue to attach, although these movements had an element of negligence in their operations.*"

The *Warilda* was cited with approval in the *Coxwold* wherein Lord Wright stated:

"This case was shortly afterwards followed by *Attorney-General v. Adelaide Steamship Company* (*The Warilda*) (39 The Times L. R. 333; (1923) A.C. 292). That vessel, which had been requisitioned by the British Government under T99, sustained damage owing to her running into the Petingaudet. The collision was due to her negligence. But as the casualty was caused by the act of those on the Warilda in directing her course through the water in execution of a warlike operation—namely, the carriage of wounded soldiers from France to Southampton in March, 1918, it was held that the damage was a direct consequence of the operation and recoverable under T99. That the loss was caused by the negligence of the suppliant's servants was immaterial. That was merely an application of the ordinary rule that in marine insurance claims it is generally immaterial that the loss was attributable to the negligence of the plaintiffs or their servants. What are

material are the event and its objective cause, negligence is not a cause for this purpose."

(5) The *Trevanion—Roanoke*, 45 The Times L. R. 550, English Commercial Cases, Vol. 35, page 29.

The facts: In this case an action was brought by the owners of the Trevanion under the British charter insuring war risk against the peril of "warlike operations". The Trevanion was under requisition to the British Government and carrying a cargo of oats from New York to Portland. The Roanoke was operated by the United States Navy as a mine planter and was on a voyage from Portland to Hampton Roads, Virginia, returning from the theater of war with 720 mines aboard belonging to the United States Navy. Both vesesls were at fault for having improper lookouts. The navigation lights were being fully displayed and collision occurred after the Armistice and in peaceful waters away from the scene of prior hostilities. In this case Lord Warrington quoted the findings of the arbitrator as follows:

"The following are the findings of the arbritrator on which the question turns:

" '5. The steamship Roanoke at the time in question was in the possession and control of the United States of America under a bare boat charter. During the period from the 25th June, 1918, to 25th January, 1919, she was employed by the United States of America solely for naval purposes as a regularly commissioned mine-planter of the United States Navy, operated by the Navy Department, officered by commissioned officers of

the United States Navy and manned by a United States Navy crew.

" 'At the time of the collision with the Trevanion the Roanoke, under her aforesaid public employment and officered and manned as above stated, was proceeding from Portland, England, to Hampton Roads, Va., with 720 mines on board belonging to the Navy Department of the United States of America, and was carrying no other cargo and no passengers. She was exhibiting the regulation lights. There was no evidence before me as to the circumstances under or the purposes for which the mines in question were being carried.

" '6. Having carefully considered the evidence as to the said collision, I find that it was caused by the negligent navigation of both vessels and that both were equally to blame. The said negligence consisted in a bad look-out on both, insufficient porting by the Trevanion, and failure to keep her course on the part of the Roanoke."

The holding: It was held (1) the Roanoke was engaged in a warlike operation; (2) the fact of mutual fault did not relieve the Crown from liability.

Lord Warrington's reasoning:

"* * * Hostilities were suspended, but the War was not at an end; and in my opinion it was open to the arbitrator to hold that, notwithstanding the suspension of hostilities, the voyage of the Roanoke under the circumstances found by him was a warlike operation.

"* * * the arbitrator has found that during the period, including the day of the collision, *the Roanoke was employed solely for naval purposes as a regularly commissioned mine-planter carrying a large cargo of*

mines. In a state of war that fact is in my opinion enough to constitute her voyage a warlike operation. It could not be denied that on the voyage out she was engaged in such an operation, and, in the absence of evidence to the contrary, the same quality must in my opinion attach to the remainder of her voyage." (Emphasis supplied.)

Viscount Sumner's reasoning:

"The appellant's proposition was that it is not enough to prove what the Roanoke was, unless it is also shown what she was doing. I recognize the high importance of considering the ship's errand and the purpose of her voyage; but I should have thought that, *having proved an animal at large to be a lion, it was not further indispensable to prove that he was not at the moment merely performing as a lamb,* unless of course some circumstances of ovine behaviour happened to be apparent. * * * *We have no right, in law or in fact, to assume without evidence that such a ship is not engaged on the duty for the service of which she forms part of the Navy to which she belongs*; and the mere fact that we do not know why she was sailing away from the ordinary area of hostilities for purposes unknown does not establish such a conclusion, however ample the scope for speculation may be. It is not for us to presume to know all the purposes of the Naval authorities of the United States at that time. *In the absence of knowledge I think that the arbitrator committed no error of law in presuming that the purpose of her voyage was such as to consist with her general warlike character, and in the like absence I think it would be useless for me to estimate the chance of her mission being of one kind rather than of another. This is a stronger case than that of a man-of-war returning to her home port still equipped with her permanent armament.* * * *" (Emphasis supplied.)

E. ***American Cases on Construction of the Terms "Consequences of Hostilities or Warlike Operations."***

There are but few American cases construing the terms "consequences of hostilities or warlike operations" as found in the F.C. & S. clause of a marine insurance policy.

The first case dealing with *war risk* appears to be that of *Queen Insurance Co. v. Globe* & *Rutgers Fire Insurance Company* (The Napoli)—278 Fed. 770 (1922 N.Y.D.C.); Aff. 282 Fed. 976 (1922) 2 CCA; Aff. 263 U.S. 487, 68 L. Ed. 402 (1923). The *Napoli,* during the first World War carrying general cargo and a small amount of military supplies sailed from Gibraltar for Genoa in convoy with screened lights, subject to orders of the escort of naval officers in command. She collided with the British steamer *Lamington* in an opposite bound convoy similarly commanded. Citing an early decision, *Morgan v. United States,* 5 Ct. Cl. 182; 81 U.S. 531 (1871) and relying on the early English decisions in the *Petersham* and *Matiana* cases, (Britain S.S. Co. v. Rex (1921) 1 A.C. 99, 123 L.T.N.S. 721, 36 Times L.R. 791, 25 Com. Cas. 392, 15 Asp. Mar. L. Cas. 58-H.L., Justice Holmes held the loss to the NAPOLI was not the result of a warlike operation within the term "all consequences of warlike operations" of a marine insurance policy.

Morgan v. United States, supra, involved construction of the term *"war risk"* in a charter party but did not include the terms "consequences of hostilities or warlike opera-

tions" nor involve construction of a marine insurance policy. As will be seen the Supreme Court of the United States as well as the House of Lords have since repudiated the narrow application of proximate cause in the*Morgan case* and earlier English decisions.

The *Queen Insurance Company case* arose prior to the *Coxwold* and the full development of the modern law construing the terms "consequences of hostilities or warlike operations." A subsequent development was the principle that a vessel carrying military stores from one war base to another was engaged in a "warlike operation." The facts of the *Queen Insurance Company case* do not indicate that either of the vessels involved were engaged in a warlike operation.

Justice Holmes in dealing with the *Queen Insurance Company case* deviated from well established principles of causation with respect to marine insurance law stating "* * * we are not to take broad views, but generally are to stop our inquiries with the cause nearest to the loss." However, Justice Holmes subsequently in *Standard Oil Co. v. United States* (1923) 267 U.S. 76, 69 L. Ed. 519 in effect repudiated the theory of causation announced in the Queen Insurance Company case and adopted the true concept of causation as applied in marine insurance law, stating:

> "In defense it is argued that the proximate cause was a marine peril not covered by the policies, and that

> the decision should be governed by *Morgan v. United States,* 14 Wall. 531, 20 L. Ed. 738; *Queen Ins. Co. v. Globe & R. F. Ins. Co.,* 263 U.S. 487, 68 L. Ed. 402; and other similar cases. But in those very strict applications of a well-known rule, however strong the motives of the insured or owners for acting as they did, the loss ensued upon their own conduct. But if a vessel should be taken from an owner's hands without his consent, and should be lost while thus held by a paramount power, obviously a company that had insured against such a taking could not look beyond, and attribute the loss to a peril of the sea. Whatever happens while the taking insured against continues fairly may be attributed to the taking. That is a non-conductor between the insured and subsequent events."

The insured vessel the *Llama* in the *Standard Oil Company case,* supra, had been seized by British officers some two days prior to the stranding which occasioned the loss. Thus the stranding, ordinarily a marine peril, was the cause nearest the loss; but, under the view adopted by Holmes, the seizure of the vessel was the proximate cause thereof, although not the cause nearest in time.

Prior to the *Queen Insurance Company case,* the United States Supreme Court in considering the construction of a fire insurance policy, and in particular an exception excluding liability for loss or damage by fire by reason of any military or usurped power had occasion to state that the proximate cause is not necessarily that cause nearest in time or place to the catastrophe. The court stated in *Aetna Ins. Co. v. Boon,* 95 U.S. 117, 24 L. Ed. 395:

"In view of this state of facts found by the court, the inquiry is, whether the rebel invasion or the usurping military force or power was the predominating and operative cause of the fire. *The question is not what cause was nearest in time or place to the catastrophe.* That is not the meaning of the maxim 'causa proxima, non remota spectatur.'

"The proximate cause is the efficient cause, the one that necessarily sets the other causes in operation. The causes that are merely incidental or instruments of a superior or controlling agency are not the proximate causes and the responsible ones, though they may be nearer in time to the result. * * *

"* * *

"The proximate cause, as we have seen, is the dominant cause, not the one which is incidental to that cause, its mere instrument, though the latter may be nearest in place and time to the loss. * * *" (Emphasis supplied.)

In *the Smaragd* (*Lanasa Fruit S.S. & Importing Co. v. Universal Insurance Co.*), 302 U.S. 556, 1938 A.M.C. 1, the United States Supreme Court again affirmed the rule that "proximate cause" is the efficient cause and not the cause nearest in time. There the court had under consideration a claim under a marine insurance policy. The Court speaking through Justice Hughes stated:

"It is true that the doctrine of proximate causation is applied strictly in cases of marine insurance. But in that class of cases, as well as in others, the proximate cause is the efficient cause and not a merely incidental cause which may be nearer in time to the result."

And further the Court in *Smaragd* decision (supra) following English law on the construction of marine insurance policies quoted with approval from *Leyland Shipping Co. v. Norwich Union Fire Insurance Society* (1918) A.C. 350, 368-371 as follows:

> "What does 'proximate' here mean? To treat proximate cause as if it were the cause which is proximate in time is, as I have said, out of the question. The cause which is truly proximate is that which is proximate in efficiency. That efficiency may have been preserved, although other causes may meantime have sprung up which have not yet destroyed it, or truly impaired it, and it may culminate in a result of which it still remains the real efficient cause to which the event can be ascribed."

In the *Coxwold* the House of Lords cited with approval the *Leyland Shipping Co. case* on the question of proximate cause, and it can now be said with assurance that English and American decisions on the subject of proximate cause are in harmony.

In the case at bar *Link v. General Insurance Company of America* (D.C. Wash. 1944) 56 F. Supp. 275, 77 F. Supp. 977 (1948) Judge Bowen in considering the *Queen Ins. Co. case said*:

> "Thus the Queen Ins. Co. case teaches that, in deciding whether a marine loss is covered by a war risk insurance clause, two principles are to be considered. One is that we 'generally are to stop our inquiries with the cause nearest to the loss.' The other is that for expediency and harmony in the marine insurance world

the American courts should follow the English court decisions. The Queen Ins. case did not say which one of those principles is paramount in case of conflict between them, probably because it does not appear such a conflict existed in that case.

"It seems clear, however, that the requirement to follow English court decisions is a more specific and less variable criterion than that of stopping at the cause nearest to the loss, because if there is an authoritative English decision on the facts of the case in question that decision concludes the matter, whereas stopping at the cause nearest to the loss may and usually does reasonably involve the further debatable question of what is or what is meant by the nearest cause of loss.

"So if on the facts involved here there are English court decisions clearly applicable, no good purpose would be served by extending discussion beyond a brief statement of the essential facts and rulings of the cited cases followed by the court's conclusions as to their application to the case at bar."

Judge Foley in his final decision in the case adopted the views of Judge Bowen, (R. 41-49—77 F. Supp. 977, 1948 A.M.C. 438).

F. *The Facts Support a Finding that Collision and Damage to M/V Eastern Prince was a Consequence of a Warlike Operation.*

The facts amply support the District Court's finding that the *U.S.S. Routabout* was engaged in a warlike operation and the collision and damage to the *M/V Eastern Prince* was a consequence of a warlike operation within the well-

established principles of marine insurance law under the leading American and English decisions.

The *U.S.S. Roustabout* in May 1942 was a duly commissioned Naval vessel of the United States Navy with the same naval status as a battleship or carrier or auxiliary. She was a Navy tanker with a capacity of 10,000 measurement barrels and with dry cargo space and dimensions of 221 feet in length and 39 feet beam. She was manned by commissioned officers and enlisted men of the United States Navy. She had armament aboard, a 3″ gun on the stern, two 50-caliber machine guns on the bridge and two 20 mm. guns forward for protection against the Japanese and capable of being used for offensive purposes against enemy water craft and air craft. (R. 80, 81, 97, 98.)

The *Roustabout* was engaged in war duties between Seattle and Sitka, the main naval war base in Southeastern Alaska and served, in addition, outlying naval auxiliary bases at Port Arthrop and Tamgas Harbor on Annette Island and the Coast Guard base at Ketchikan (R. 82, 85, 103). She carried no commercial cargo (R. 82) and there were no civilian employees on her as either officers or crew (R. 81, 97) nor was she operated at the time as a merchant vessel (R. 82, 187). Her primary duty was carrying bulk petroleum products in a *shuttle service* between naval bases in Seattle and *war bases* in Southeastern Alaska for the United States Navy in time of war (R. 82, 85, 98, 99, 103). Oper-

ating as a naval tanker in time of war she lifted her cargo from naval war bases at Seattle which served as supply bases for the entire Alaska-Aleutian area (R. 82, 99, 100, 101, 102). In addition to petroleum products she carried Navy bombs, ammunition, torpedoes and any munitions or war supplies as required in the prosecution of the war. (R. 82, 83, 85, 86, 99).

The war bases in Alaska were active war bases (R. 101). In her continuous *shuttle service* she maintained regular runs between Seattle and war bases in Southeastern Alaska. Southbound she would return cargo of all descriptions including defective ammunition, empty oil drums, empty torpedo cases (R. 101, 102, 103) and her purpose in returning to Seattle was to re-load with petroleum products and dry cargo, bombs, torpedoes, etc. for the Navy and go North again to war bases in Alaska (R. 102). The petroleum products and munitions carried to Alaska were for use of combat surface vessels and aircraft "The Naval Forces Afloat, Ashore and in the Air" (R. 86). Southbound cargo was for the benefit of the Navy, defective ammunition going to Ordnance (R. 86), airplane parts being delivered to the Naval Air Stations and empty gasoline or oil drums being returned to the Navy for refilling (R. 86). She was on active Naval duty in time of war as a duly commissioned Naval vessel of the United States Navy at the time of collision (R. 87). "A commissioned vessel of the United States Navy is a ship

of the Navy, regardless of what her past history was or what her category was" (R. 87). In May 1942 the Navy was in dire need of transportation and utilized the dry cargo space of the *Roustabout,* for the transportation of bombs and other ammunitions needed in Alaska for war purposes (R. 89). The Roustabout carried aerial bombs for patrol planes, torpedoes for planes and submarines and various and sundry other munitions for use in waging the war against Japan (R. 91.) There is a tremendous amount of defective ammunition always moving the other way from an advanced area. It was the *Roustabout's* duty and she was employed to carry this defective ammunition away from the advanced area (R. 92).

The area in which the *Roustabout* traveled in the performance of her naval duty in time of war was an active war area. Captain Larry Parks, her Commander, went on active duty as an United States Commissioned Officer on May 12, 1942 (R. 95) and became Commanding Officer of the *U.S.S. Roustabout* on March 30, 1942 (R. 96). There was one Japanese submarine sunk in the area of collision (R. 98) and enemy activity was reported in the general region (R. 101).

Admiral Frederick Zeusler confirmed other testimony that the *U.S.S. Roustabout* by nature of her character, her duty and her service was engaged in a warlike operation at the time of the collision. He has had approximately 39 years

active service in the United States Coast Guard with 13½ years in Alaska. He was on the staff of *Comal* which was the name of the command of the Alaska Sector in the early days of the war with Japan (R. 181) and was in personal command of the Floating Forces in the Sitka Sector in May 1942 (R. 181, 182). Admiral Zeusler had knowledge of the *Roustabout,* of her character and the nature of the service in which she was engaged. He testified:

> "* * * The USS Routabout was used as tanker and general service vessel between Seattle and bases in Alaska. While in Alaska we used her for various duties, depending on the conditions that existed. In the early days it was absolutely necessary to make use of everything—every type of craft we could possibly get; fishing vessels, towboats, anything that was available, because our equipment in Alaska was extremely bad. We were limited to very few types of craft, so that when we got a vessel of any kind whatsoever we converted her as fast as we could and made her available for any type of duty that we needed. *The ROUSTABOUT was used primarily in shuttle service between here and Alaska.* (R. 182). * * *
>
> "She was a commissioned vessel, the same as any of the other vessels that we have, manned by commissioned officers and men." (R. 183).

The naval war bases of supply were in Seattle at Pier 91, Manchester and Bremerton, which bases furnished gasoline and ordnance equipment that were needed by the Navy for Alaska. In May 1942 a state of war existed between the Empire of Japan and the United States of Amer-

ica (R. 183). Respecting war activity in the Alaska sector in 1942 Captain Zeusler testified:

"We had reports from planes, ships, patrol vessels, fishermen of submarine activities on the 22nd of January, the 7th of February, the 22nd of March, the 1st of April, the 12th of April, the 23rd of May, the 7th of June, the 13th of June, the 7th of July and the 20th of July. (R. 184).

"Q. What, if anything, did you do or was done under your orders or command in reference to that war activity; what did our Forces do?

"A. I was in Command of the Floating Units and coordinated floating units with the aviation units from Sitka, Annette Island, Port Armstrong and Port Althrop.

"I might say that we finally got our first submarine on July 9th. That submarine was sunk about thirty miles off the west coast of Prince William,—I will have to check on that Island. (R. 184).

"Q. What general locality?

"A. Approximate latitude of 51 degrees, 21 minutes, 2 seconds; longitude, 134 degrees, 40 minutes, and 7 seconds west. Following the middle of June, the Gorgas was attacked by a submarine and she managed to escape but she was pretty well peppered with shots.

"In July the Arcadia, a merchant vessel, was sunk one hundred miles south of Kodiak. One of our fishermen—that we had inducted into the Service—picked up a crew. She was then in an auxiliary status. (R. 184).

"Q. Admiral, what if any war bases in your Sector, in the Territory of Alaska, were served by the USS Roustabout during the month of May, 1942? (R. 184).

"A. In direct service they were usually the bases at Ketchikan and Sitka. (R. 185).

"Q. [Were] those war bases?

"A. Yes, sir.

"Q. Active?

"A. Active—extremely active. The other bases that were serviced were Port Althrop, which was a Navy auxiliary facility, Juneau, which was a section base, Port Armstrong, which was a Navy auxiliary facility. We had to send her out to Kodiak on a number of occasions, and she also visited Seward, both of which were also active sections." (R. 185).

"A. From Port Althrop we operated patrol boats and two planes. Those patrol boats and planes were used at the entrance,—were used to check on enemy activity at the entrance to that particular port. At Juneau we maintained section bases,—section bases where we had approximately four patrol craft. At Sitka we had floating patrol craft and planes. Those planes were used to scout offshore for enemy submarines, especially with regard to convoys. At Port Armstrong we maintained patrol boats and some planes and they were used to scout offshore and also to patrol the entrance, because those days we did not allow large, slow craft to go off shore. We made most of the vessels go inside because of the fact that we knew submarines were off the American coast or off the Alaska coast. In many cases those vessels were

usually formed into convoys and taken across in formation. From Ketchikan we operated patrol craft and two planes. From Annette Island we operated one patrol craft and planes. Annette Island's planes and Ketchikan's planes were used for patrolling the Dixon Entrance Sector. (R. 187, 188).

"Q. What function did the Roustabout serve, Admiral, in connection with the operation of surface (and) aircraft at these bases during May of '42?

"A. The materials that she brought to us were used to service these crafts." (R. 188).

While land forces of the Japanese did not land in Southeastern Alaska there was activity of their sub-surface craft in Southeastern Alaska. Submarines were sighted in Dixon Entrance within a mile of Annette Island and off observation posts off the West Coast within a mile of shore and off the coast of Oregon, Washington, California and British Columbia, and submarines sank "ships up there (Southeastern Alaska), too." (R. 197).

Not only were the facts of the Roustabout engaging in a warlike operation confirmed by all of the libelants' witnesses but the only witness produced by the appellant confirmed the warlike character and warlike operation of the *U.S.S. Routabout*. Mr. Beasley, lookout aboard the *U.S.S. Roustabout*, still in the Navy and a seaman aboard the *U. S.S. Roustabout* at the time of the collision, was a regular Navy enlisted man (R. 213). He testified that the *U.S.S.*

Roustabout was officered by officers of the United States Navy and manned by enlisted personnel of the Navy and that she was a duly commissioned vessel of the United States Navy in May 1942 engaging in a *shuttle run* between Seattle naval bases and war bases in Alaska carrying petroleum products northbound and bringing back whatever she could southbound (R. 213, 214). In addition to carrying petroleum products northbound, Mr. Beasley testified that she carried ordnance materials, meaning small arms, ammunition, anti-aircraft ammunition and torpedoes for submarines or aircraft (R. 214) and that southbound she brought back damaged airplanes and defective ammunition and damaged airplanes (R. 214, 215). The *U.S.S. Roustabout* was serving active war bases with war cargo for purposes of prosecuting the war. He testified further:

"Q. The cargo of petroleum products and ordnance materials you picked up where at Seattle—at Pier 91 or other stations here in Seattle?

"A. In this area, yes, sir.

"Q. And you delivered them to Sitka and other bases in Alaska?

"A. Yes, sir.

"Q. Were those active Naval Bases at that time in May of '42?

"A. Yes, sir.

"Q. Were there patrols being made by air and surface

craft out of those bases at that time searching for enemy submarines and aircraft?

"A. To my knowledge, yes.

"Q. And the petroleum products, including aviation gas, that you carried on the Roustabout northbound, were used in those planes and vessels, were they not?

"A. Yes, sir." (R. 214, 215).

Judge Foley in his summation of the evidence stated:

"We learn, however, from the witnesses that during a period of time including the month of May, 1942, the Roustabout was engaged in the service of the United States Navy in transporting from Seattle and nearby bases to war bases in southeastern Alaska, petroleum products, bombs, ammunition and other dry cargo for the use of the Armed Forces in carrying on the prosecution of the war with Japan. Her operations also included transporting from Alaskan bases to bases in Seattle and vicinity, such freight as was offered by the Navy or Coast Guard consisting generally of empty containers, oil drums, empty acetylene and oxygen tanks, damaged airplane motors, damaged airplanes, trucks, automobiles, torpedo cases and defective ammunition. * * *" (R. 41).

It is to be noted that the leading English authorities (with the exception of the *Coxwold* and the *Geelong-Bonvilston* which were found to be engaged in a warlike operation because of their carrying war cargo to a war base), rest their decisions on the character of the vessel, on the nature of her war duties, i. e. that it was a war vessel owned and

operated by the Navy or Army in time of war and the fact that the war vessel at the time was about her duty in time of war. It was found to be immaterial in which direction the war vessel was going or what she was carrying. For example, the British destroyer *Tartar* when in collision with the *Ardgantock* was on the "turn" of her beat while on duty patrolling for submarines. The British war ship *H.M.S. Devonshire* when in collision with another vessel was on her way to meet a convoy. The *Warilda,* when in collision with another vessel was an Army hospital ship headed back to England away from active war bases. The *U.S.S. Roanoke,* a mine planter, when in collision with another vessel was headed toward America and near America away from the scene of hostilities and in peaceful waters. Notwithstanding that in all four of these cases the war vessels were not engaged in combat or headed toward a combat zone the Court held by reason of their character as war vessels about their duty in time of war they were nonetheless engaged in a warlike operation within the meaning of that phrase in a marine insurance policy.

G. *Discussion of Authorities Relied Upon by Appellant.*

The authorities cited by appellant do not support its position. In *Harrisons, Ltd. v. Shipping Controller,* (1921) 1 K.B. 122, 15 Asp. M.C. 270, the merchant vessel Inkonka, navigating in a war zone and sailing without lights stranded.

She carried hospital stores for the British Government and was laden with troops and officers. The court felt that the vessel was not herself engaged in a warlike operation. It does not appear that this case was appealed and the decision in this respect is superseded by the House of Lords case of the *Geelong-Bonvilston.* 39 The Times L.R. 133; (1923) XIII Ll. L. Law Rep. 455, which held that a vessel carrying ambulance wagons and other Government stores to or from a war base was engaged in a warlike operation. Unlike the *Roustabout* the *Inkonka* was not a war vessel in the service of the military or naval service of her country.

Wynnstay Steamship Company, Ltd., and W. I. Radcliffe Steamship Co., Ltd. v. Board of Trade, (1925) 23 Ll. L. Rep. 278, was another King's bench case in which there appears to have been no appeal. There the *Sylvan Arrow,* a U.S. Navy tanker, after the Armistice dragged her anchor thereby coming into collision with the merchant vessel the *W. I. Radcliffe. The Sylvan Arrow* had been engaged in carrying oil to the U. S. Fleet *but at the moment she had no orders.* It was contended that the damage to the *W. I. Radcliffe* was a consequence of a warlike operation. According to the court "* * * she had carried oil, was prepared to carry it again and might carry it either for war ship *or for anybody else.* But she was not carrying it, *and she was not going anywhere to fetch it.* She had come back and was anchored awaiting orders * * * She was waiting there to see what was

to be done with her next." (Emphasis supplied.) Thus it clearly appears from the facts that the moment of collision the *Sylvan Arrow* was not engaged in any war duty, hence was not engaged in a warlike operation. Compare *Athel Line Ltd. v. Liverpool & London War Risks Assoc. Ltd.* (1945 Court of Appeals) 62 The Times L.R. 81 (infra) (approved by Lord Porter in the *Priam, Liverpool & London War Risks Insurance Assoc. Ltd. v. Ocean S.S. Co. Ltd.*, 63 The Times L.R. 594, 599; (1931 A.C. 23) where damage to a tanker engaged in a warlike operation and occasioned by grounding by reason of dragging her anchor was held to be a consequence of a warlike operation. Compare with *Roanoke-Trevanion* (*Supra*).

Clan Line Steamers, Ltd. v. Liverpool and London War Risks Insurance Assoc., Ltd., (the *Orlock Head*) (1943) 1 K.B. 209, was another lower court case, and involved not the carrying of munitions or war material but raw materials on a voyage to ports for distribution to munition factories. This case is distinguishable from the case at bar and not inconsistent with the leading English decisions in that her cargo was not for the purpose of waging offensive or defensive war and was not in any sense a military cargo.

In *Leyland Shipping Company, Ltd., v. Norwich Union Fire Insurance Society, Ltd.*, 34 The Times L.R. 221 (1918) A.C. 350, the torpedoing of a vessel was held to be the proximate cause of the loss and damage and hence a war risk

though the vessel did not sink and become a loss until after she was grounded in the harbor. This case is likewise consistent with leading English decisions and has been previously cited herein as sustaining the principle of proximate cause contended for by appellees.

Admiralty Commissioners v. Brynawel S.S. Co., 17 Ll. L. Rep. 89 (K.B. 1923) the vessel was held not to have been engaged in a warlike operation. A minesweeper, after the Admiralty had ceased minesweeping, went to a place for refueling by colliers. She was engaged in coaling and not engaged in any action preparatory to resuming a warlike operation. The case was not appealed. The opinion nevertheless recognizes that almost any movement of one of His Majesty's ships at sea in time of war constitutes a warlike operation. This is a so-called "bumping" case and may be considered consistent with leading English decisions on the basis that the vessel at the time was not engaged in a warlike operation or if so engaged, damage resulted solely from the action of wind and sea. The case was prior to the *Coxwold,* the *Atheltemplar* and the *Priam* and had the Court found the vessel engaged in a warlike operation the result no doubt would have been otherwise.

In the *Atheltemplar, Athel Line, Ltd. v. Liverpool & London War Risks Insurance Assoc., Ltd.,* (1945 Court of Appeals) 62 The Times L.R. 81 (appellant's brief p. 34), a chartered merchant tanker was carrying oil to a war base and came to rest at anchor when damage occurred to her hull

through dragging anchor. This case is more recent and of higher authority than the lower court case of the *Sylvan Arrow* (*Supra*). The Court of Appeals held the damage to be a consequence of a warlike operation. Although she was anchored and not actually proceeding to a war base at the time of the stranding this did not suspend her warlike operation or prevent the damages from being a consequence of a warlike operation within the meaning of that term in an insurance policy.

Appellant cites several American decisions. In *Standard Oil Co. v. St. Paul Fire and Marine Insurance,* 59 F. Supp. 470, the action was on an open cargo policy of marine insurance. Notwithstanding the assertion of appellant that "the *Petter* was clearly engaged in a warlike operation," the finding was otherwise. The case proceeded on the theory of a "seizure" within the authority of *Muller v. Globe & Rutgers Fire Ins. Co.,* 246 Fed. 759. In *Meseck Towing Lines v. Excess Insurance Company, et al,* 77 F. Supp. 790 (E.D.N.Y. 1948) the court accepted the erroneous notion of proximate cause, as indicated in the *Queen Insurance Company case.* From the court's decision: "It appears that the war vessel at the time of the collision *had not entered upon the patrol duties which were to be performed* * * *" On the other hand the *Roustabout* was actively engaged in her war duty in time of war. The case may be distinguished on the facts in that at the time of the collision she was not engaged in a warlike

operation. Other American cases cited by the appellant are inapplicable inasmuch as they do not involve the construction of the terms "consequences of hostilities or warlike operations" under a marine insurance policy.

Appellant's contention that the *Roustabout* was not engaged in a warlike operation at the time of the collision because she was designated "YO" meaning "yard oiler" is valueless in view of the showing of her actual services, i. e. she was a duly commissioned Naval vessel engaged in Naval duties in time of war *and in service of transporting petroleum products and munitions of war from war bases of supply in Seattle to active war bases in Alaska for use by its combat surface and aircraft in active war areas.* Her character and services did not change although she was returning at the time of the collision for the purpose of making another trip. Even while so doing she was carrying defective ammunition, empty torpedo cases and empty oil drums, which was an important part of her Naval duties. The appellant's further contention that the *Roustabout* was not engaged in a warlike operation because before the war she was a commercial vessel engaged in purely commercial commerce and because after the war she returned to commercial service does not make inoperative the fact that at the time of collision she was engaged in a warlike operation. The appellant's contention that the size or speed of the *U.S.S. Roustabout* makes a difference in her warlike character is likewise an

untenable argument in view of the actual showing that she was a war vessel engaged in a warlike operation at the time of collision. For the foregoing suggested propositions appellant offers no authorities. It is not enough for appellant to distinguish authorities on unimportant facts without applying well settled principles and authorities to the facts of the case at hand. The character of the vessel and the duty and services which she was performing at the time of the collision is paramount to such unimportant facts as her designation, size, and speed or that at one time or another she was engaged as a commercial vessel.

Appellant in its final attempt to overcome the overwhelming force of American and English decisions on the subject of marine insurance law introduces into the argument the so-called "over-all agreement." (1945 A.M.C. 1027). This so-called agreement is interesting but wholly irrelevant for it sets forth only what the parties thereto think the law is or should be and is binding on no one. It is noted appellant was not a signatory to the agreement and certainly appellees were not. The terms of the so-called "over-all agreement" by special provision are: "Without prejudice * * * and are not to be used by either party or by *third parties* as admissions with respect to legal liability." 1945 A.M.C. 1027, 1035 (Emphasis supplied). Even so, the *Roustabout* under the definitions therein is a *"warship."* Under Principle No. 3, 1945 A.M.C. 1032, it is clear that

the damage to the *Eastern Prince* was a result of war risk. Appellant's argument that the change in the F.C. & S. clause shows the intention of the parties is likewise of no significance. In fact, the stronger argument would be the other way, namely that the parties recognized the true construction to be placed upon the F.C. & S. Clause as determined by the *Coxwold* and in the face of this recognition, for economic and business reasons, changed the terms of the F.C. & S. Warranty and adjusted the premiums accordingly.

The *Priam, Liverpool and London War Risks Insurance Association, Ltd. v. Ocean S.S. Co., Ltd.,* 63 The Times L.R. 594 (1948) A.C. 243, is cited by appellant on pages 25 and 39. The House of Lords in this, its most recent decision, affirmed its holding in the *Coxwold,* to-wit, that damage to a vessel engaged in a warlike operation, whether caused by collision or stranding, is a consequence of a warlike operation; although damage to a vessel engaged in a warlike operation *caused solely by heavy weather would be a marine risk.* The *Priam* was admittedly engaged in a warlike operation. Damage to the forward part of the vessel, No. 2 hatch, occasioned by an element of the warlike operation was held to be a war risk, while other damage caused *solely* by heavy seas was held to be a sea risk. Reaffirming the rule that damage caused by a vessel in a stranding or collision is a consequence of a warlike operation. Lord Wright said:

"On the main issue, however, it seems to me that

there is a real difference of substance in this context between the ship striking a rock or colliding and being struck by a sea. It is true that it is while she is pursuing the contemplated warlike operation that the sea strikes her, and that her striking the rock or colliding is as little purposed as her being struck by a heavy sea. But in the former case she is an active agent *quoad* striking the ship or rock, in the latter she is merely passive. I think that this is a sufficient distinction on the authorities for this purpose.

* * *

"This House did indeed unanimously reverse the judgment of the Court of Appeal in The Coxwold (supra), partly on grounds of fact, but also on the grounds that the ship stranded while engaged on a warlike operation, that stranding was for this purpose equivalent to collision, and that therefore the decision was governed by express authority. Further than that the House did not decide. Outside of the particular concept of the "warlike operation" or particular war risks the sea peril remains and must still be held to the the operative peril for which the marine underwriters continue to be liable, except in the case of collision, stranding or the like, due to the ship, a 'warlike operation' being actively directed into the obstacle on her warlike course. * * *"

Lord Sumner approved the holding in the *Coxwold* and in the *Atheltemplar*. He stated:

"In reaching a conclusion what those rights are your Lordships are, of course, bound by a series of previous decisions in this House beginning with The Petersham and Matiana (supra) and ending with Yorkshire Dale Steamship Company, Limited v. Minister of War Transport (The Coxwold) (58 The Times L. R. 263; (1942) A. C. 691), and it is neither advantageous nor indeed

possible to try to lay down a fresh standard. I have already stated in the last-mentioned case what I believe the results of the previous decisions to have been, and would only add that the opinions expressed in that case, or at any rate those of the majority, were to the effect that when a ship is engaged in the warlike operation of proceeding with war stores from one war base to another, a collision with another ship or a grounding which is the result of that operation is a war loss. The later case of Athel Line, Limited v. Liverpool and London War Risks Insurance Association, Limited (The Atheltemplar) (62 The Times L.R. 81, (1946) K.B. 117) in the Court of Appeal does not, I think, carry the principle any further. It is true that the vessel was at anchor, but she had deliberately put herself in the position in which she grounded so that it was her act which caused the loss, though she did not know what its consequences would be."

He further stated:

"As Lord Wright pointed out in The Coxwold (supra), the basis of the decisions seems to be that the casualty can be traced to definite action on the part of those on board the quasi-warship in directing the course of the vessel to carry out the warlike operation. That direction may take her into collision with another vessel, or on to a rock, but incidents may occur in the course of the voyages without being caused by such definite action on the part of those directing it. In the case of stranding or collision the progress of the ship brings her on to the rock or into the other vessel. The rock does not move; it is static. If the other vessel runs into her and it is that vessel's action which causes the injury, it is the progress of that ship and not that of the damaged vessel which causes the injury, and whether that injury is a war or marine loss depends on whether the other ship, not the damaged vessel, is engaged on a warlike operation or on an ordinary mercantile adventure."

Both Judge Bowen and Judge Foley following the leading English decisions on the subject agreed and determined that the *U.S.S. Routabout* was engaged in a warlike operation and that the collision and damage to the *M/V Eastern Prince* was a consequence of a warlike operation. Judge Foley in his decision stated:

> "* * * Considering the facts established by the evidence here as similar facts were considered in the Roanoke case (Board of Trade v. Hain Steamship Co., Ltd., supra), we have no right in law or in fact to assume without evidence that the Roustabout was not engaged on the duty of the service of which she formed part of the Navy.
>
> "The collision of the vessels Roustabout and Eastern Prince was due in part to the action of the Roustabout in a warlike operation. The damage to insureds' vessel, Eastern Prince, was a consequence of warlike operations of the Roustabout, a duly commissioned vessel of the United States Navy officered and manned by naval officers and crew and operated by the Navy in aid of the prosecution of the war with Japan. The collision was a result of mutual fault of both vessels." (R. 46)

H. ***The Evidence is Clear that the Collision Occurred by Reason of the fault, at Least Contributing Fault of U.S.S. Roustabout while Engaged in a Warlike Operation.***

The District Court found:

> "4. That the site of the collision is a narrow channel under the International Rules.
>
> 5. That at the time of said collision the USS Roustabout was at fault as follows:

(a) Failing to keep to the right of the channel;

(b) Failing within sight of the Eastern Prince to indicate a change of course on her whistle;

(c) Failing to keep a proper lookout in that the lookout aboard the Roustabout after sighting the red light of the Eastern Prince took no action concerning same and failed to notify the officer on the bridge of the whereabouts of the Eastern Prince." (R. 49).

The testimony was oral and the trial court had full opportunity to hear the witnesses and judge their testimony. While on appeal trial in admiralty is de novo, the findings of fact and conclusions of the trial court will not be disturbed by the appellate court unless the trial court is plainly wrong. *Portland Tug & Barge Co. v. Upper Columbia R. Tow. Co.,* (9 C.C.A. 1945), 153 F. (2d) 237, 238; *Matson Nav. Co. v. Pope & Talbot, Inc.,* (9 C.C.A., 1945) 149 F. 2d 295, 298; *Puratich v. United States,* (9 C.C.A., 1942) 126 F. 2d 914, 916; *The Heranger,* (9 C.C.A., 1939) 101 F. 2d 953, 957; *McLain Line, Inc. v. Pennsylvania R. Co.,* (2 C.C.A., 1937) 88 F. 2d 435, 436; *The Mabel,* (9 C.C.A., 1932) 61 F. 2d 537, 540. The trial court was so plainly right in its finding of fault on the part of the *Roustabout* there could be no other conclusion from the evidence.

(a) The *Roustabout* was at fault for violation of the Narrow Channel Rule.

The collision took place in Discovery Passage, British

Columbia, which runs northerly and southerly (R. 104). Both masters agreed that the site of the collision, Discovery Passage, was a narrow channel within the meaning of the Narrow Channel Rule, International Rule, Article 25. (R. 105, 159). At the time and immediately prior to the collision the *Roustabout* was being navigated in violation of the Narrow Channel Rule, that is, on the wrong side of the channel or in this instance on the easterly side or her left side of mid-channel (R. 105, 130, 160) Reference to the chart of Discovery Passage (Libelant's Ex. No. 2) shows an adequate depth of water on the westerly side of the channel (that is the *Roustabout's* right of mid-channel) and conclusively shows that it was safe and practicable for the *Roustabout* to navigate to her right side of mid-channel in compliance with the Narrow Channel Rule. Capt. Parks admitted that he could have with safety navigated to the right of mid-channel (R. 107).

The International Rules of the Roard, Article 25, known as the Narrow Channel Rule provides:

> "In narrow channels every steam vessel shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such vessel." International Rules Art. 25, 33 USCA Sec. 110.

Thus the *Roustabout* was clearly guilty of violation of the statutory rule in navigating on the wrong side of a narrow channel.

(b) The *Roustabout* was at fault for failure to indicate change of course by whistle signal.

The *Roustabout* was clearly at fault for failure to indicate her change of course to port by a whistle signal of two blasts as required under International Rules of the Road, Article 28. The pertinent aspects of this rule are set forth as follows:

> "* * * When vessels are in sight of one another, a steam vessel under way, in taking any course authorized or required by these rules, shall indicate that course by the following signals on her whistle or siren, namely:
>
> * * * Two short blasts to mean, 'I am directing my course to port.
>
> * * *" (International Rules of the Road, Art. 28, 33 USCA Sec. 113).

The evidence of violation of the foregoing rule is undisputed and is found in the admission of Captain Larry Parks, Master of the *Roustabout* who testified as follows:

> "Q. Prior to the collision did you observe the lights of the Eastern Prince? A. Yes, sir.
>
> "Q. After observing the lights of the Eastern Prince and prior to the collision, was the course of the U.S.S Roustabout altered? A. Yes, sir.
>
> "Q. Were any signals sounded in accordance with United States International Rule 28 upon the changing of that course? A. No, sir.
>
> "Q. I mean sounded by the Roustabout? A. No, sir."

The fault of the *Roustabout* in failing to signal her change of course is confirmed by Captain Rose of the *Eastern Prince* (R. 158) and the Quartermaster of the *Eastern Prince* (R. 133). Thus the *Roustabout* was clearly guilty of a further statutory fault in failing to signal a change of course as required under International Rules of the Road, Article 28.

(c) The *Roustabout* was at fault for failure to keep a proper lookout.

This fault is established by the testimony of the *lookout* aboard the *Roustabout who testified*:

> "Q. When you saw the red light of the Eastern Prince, —and you did see it prior to the collision, didn't you? A. Yes, sir.
>
> "Q. You took no action whatsoever; I wrote down your answer. Is that correct? A. That is right."

On direct examination he testified that the duties of the lookout on the *Roustabout* were "to watch for dangers to the ship * * * and to warn the commanding officer of any danger," but he "was at a loss to take any action whatsoever" (R. 210, 211). The International Rules of the Road, Article 29, provide:

> "Nothing in these rules shall exonerate any vessel, or the owner or master or crew thereof, from the consequences of any neglect to carry lights or signals, or *of any neglect to keep a proper lookout,* or of the neglect of any precaution which may be required by the ordin-

ary practice of seamen, or by the special circumstances of the case." (Emphasis ours.) International Rules of the Road, Art. 29, 33 USCA Sec. 121.

Thus the *Roustabout* was guilty of the further fault in failing to maintain a proper lookout.

Having shown statutory violations of the Rules of the Road, (a) violation of the Narrow Channel Rule, International Rules of the Road, Art. 25, (b) violation of International Rules of the Road, Art. 28, in failing to indicate change of course by whistle signal as required, and (c) violation of International Rules of the Road, Art. 29, in failing to keep a proper lookout, it follows from the rule of *"The Pennsylvania"* that the statutory faults of the *Roustabout* are presumed to have contributed to the collision. In such a case the burden rests upon the appellant to show that such breaches of statute not only probably did not contribute to the collision but they could not have done so. This fundamental admiralty rule, having its origin and particular application to admiralty cases, is stated in the *SS. Pennsylvania v. Troop,* 86 U.S. 125, as follows:

> "The liability for damages is upon the ship or ships whose fault caused the injury. But when, as in this case, a ship at the time of a collision is in actual violation of a statutory rule intended to prevent collisions, *it is no more than a reasonable presumption that the fault, if not the sole cause, was at least a contributory cause of the disaster. In such a case the burden rests upon the ship of showing not merely that her fault might not have been one of the causes, or that it probably*

was not, but that it could not have been. Such a rule is necessary to enforce obedience to the mandate of the statute." (Emphasis supplied.)

To the same effect: *The Denali,* 105 F. (2d) 418, adhered to (CCA 9) 112 F. (2d) 952; *The Silver Palm,* 94 F. (2d) 754, 759 (CCA 9), Certiorari denied 304 U.S. 576; *The Princess Sophia,* 61 F. (2d) 339, 347 (CCA 9); *Puget Sound Navigation Co. v. Nelson,* 59 F. (2d) 697, (CCA 9); *Carr v. Hermosa Amusement Corp· Ltd. (Olympic-Sanito Maru),* (9 CCA 137 F. (2d) 983, 987; *Lie v. San Francisco and Portland S.S. Co.,* 243 U.S. 291, 298, 61 L.Ed. 726, affirming the *Beaver-Selja,,* (9 CCA) 219 F. 134, 137; *The Martello,* 153 U.S. 64; *Belden v. Chase,* 150 U.S. 674, 679; *Richelieu & O. Nav. Co. v. Boston Marine Ins. Co.,* 136 U.S. 408, 422; *The E. Madison Hall,* 140 F. (2d) 589 (4 CCA); *The Bohemian Club,* (3 CCA) 134 F. (2d) 1000; *General Sea Foods Corp. v. J. S. Packard Dredging Co.,* (1 CCA) 120 F. (2d) 117.

Appellant has clearly failed to sustain this heavy burden of proof.

Appellant contends here as it did in the trial court that the situation was an "overtaking situation," as defined by International Rules of the Road, Art. 24, 33 USCA Sec. 109. If this contention be correct then it was the duty of the *Roustabout* to keep out of the way of the overtaken vessel, the *Eastern Prince·* This she failed to do and was thereby guilty of a plain statutory fault and must sustain the burden imposed by the rule of *"the Pennsylvania."*

The evidence and the law in the case clearly establish the fault of the *U.S.S. Roustabout* and hence under Judge

Bowen's decision, Judge Foley's decision and the leading American and English authorities on the subject, the collision and loss and damage to the *M/V Eastern Prince* was a consequence of a warlike operation as that term is understood in marine insurance.

II. Appellees are Entitled to Interest.

In Admiralty, interest on claims arising out of breach of contract is a matter of right. This action is on a contract of insurance. The District Court allowed interest on the contract from the 11th day of September 1942, the date the claim was presented to the appellant for the agreed sum of $11,031.29. The claim, it is admitted, was accompanied by the General and Particular Average Statement and liability thereupon denied as admitted in the pleadings. (Para. 5 Amended Libel, R. 5, para. 5 Answer, R. 37). It is stipulated that the statement of claim was properly stated (Stipulation of Facts re Amount of Loss R. 38-40) and the agreed sum was found due by the Court (R. 50).

In Benedict on Admiralty it is stated:

> "Sec. 419· Interest on Damages.
>
> "In admiralty, interest on claims arising out of breach of contract is a matter of right but the allowance of interest on damages in cases of collision, or other tort or for unliquidated damages, is always in the discretion of the court and such interest may be allowed or disallowed by the district court or on appeal by the Circuit Court of Appeals or by the Supreme Court. The rate of

> interest adopted is that allowed by statute in the courts of the State. * * *" (Vol. 3 Benedict on Admiralty 191, 6th Edition).

The appellees are entitled to interest at 6 per cent on the amount due under the insurance policy from the date of demand for payment pursuant to the statement of account marked Libelants' Exhibit 5, admitted in evidence without objection. (R. 220).

A general average statement is an account stated against the underwriters. In *Gulf Refining Co. v. Universal Insurance Co.*, 32 F. (2d) 555, 557 (2 CCA 1929), the court stated:

> "The general average statement determined the debt due from each set of underwriters."

In *Kohler & Phase v. United American Lines,* 60 F. (2d) 530, 533 (S.D. N. Y· 1932), the court stated:

> "In my opinion, a general average statement is merely the statement of an account."

There being no dispute as to the account stated, except as to the liability by reason of coverage, the claim is calculable by mathematical process. A claim for damages calculable by mathematical process should include interest. See *Steeves, et al v. American Mail Line, Ltd.*, (9 CCA 1948) 156 F. (2d) 59, where interest was allowed at 6 per cent in a case in the District Court for Washington.

Interest at 6 per cent in the State of Washington is allowed on contracts where determinable by computation, *United States v. Skinner & Eddy Corp.*, (9 CCA), 35 F. (2d) 989. See also *Seattle Curb Exchange v. Knight,* (9 CCA) 59 F. (2d) 39. In the courts of the State of Washington it is proper to allow interest on insurance claims from the time the claim becomes payable.

> "Interest on money detained after it is due and payable is recoverable as a matter of legal right· *Wood vs. Cascade Fire, etc. Ins. Co.,* 8 Wash. 427, 431." 36 Pac. 267.

Even where the amount due is in controversy and unliquidated, it has been held proper to allow interest for money detained on a claim under an insurance policy. *Glover v. Rochester-German Ins. Co.,* 11 Wash. 143, 157. 39 Pac. 380.

Following the rational of the Ninth Circuit and applying a similar interest statute of the State of California, interest is payable in the case at bar for the reason that the sum set out in the proof (Statement of General and Particular Average—Libelants' Ex. No. 5) was the amount found due by the Court. It was stated in *National Union Fire Ins. Co· v. California Credit Corp.,* (9 CCA) 76 F. (2d) 279, 290:

> "If proofs of loss filed by insureds * * * set out the claims in the manner and amounts as subsequently found due by the trial court, it would seem to follow from the above cases that interest would be allowable from the date payment became due under the policy."

Interest has been properly allowed in admiralty on a policy of war risk insurance issued by the United States in the case of *Standard Oil Co. v. United States* (Llama), 267 U.S. 76, 69 L. Ed. 519.

In the *Naiwa* (4 C.C.A.) 3 F. (2d) 381, 384, the District Court allowed interest on $27,500.00, the amount of out-of-pocket cost incident to salvage services, and the court on appeal stated:

> "We are not inclined to disturb the finding of the lower court in the matter of the allowance of interest."

With respect to collision cases the general rule is to allow interest. In *Managua Nav. Co. v. Aktieselskabet Borgestad,* 7 F. (2d) 990, 994, the Court of Appeals stated:

> "The general rule is to allow interest from the date of the collision. *The Manitoba,* 122 U.S. 97, S. Ct. 1158, 30 L. Ed. 1095; *Galveston Towing Co. v. Cuban S.S. Co.,* 195 F. 711, 115 C.C.A. 438; *The El Monte,* 252 F. 59, 164 C.C.A. 171. Nothing in this case appears to justify an exception to the general rule, and the decree would fall short of indemnifying the owner of the Borgestad for the loss it sustained, if interest is not allowed on the amount of such loss from the time it was actually sustained."

It is an abuse of discretion for the District Court in a case of collision damages to refuse to allow interest in the absence of "peculiar facts" causing the denial of interest. *The President Madison* (9 C.C.A.) 91 F. (2d) 985.

In this case the libel proceedings were filed September

17, 1942, the collision having occurred May 11, 1942. Proceedings were instituted immediately following presentation of the claim and denial of liability by appellant. November 9, 1942 (50 days later) appellant filed "preemptory and dilatory exceptions." By reason of the nature of the case it was necessary for both parties to prepare and file extensive briefs. Appellees exceptions were noted December 20, 1943. The hearing was continued to January 3, 1944 *at the request of the appellant*. It is to be noted at this point that appellant had equal opportunity and right to note the exceptions for hearing. On May 31, 1944, District Judge Bowen announced his decision, the Court in the meantime having considered exhaustive briefs and extensive oral arguments. The decision of District Judge Bowen established the law of the case and appellant's liability for payment, and thereafter appellant was in a position to bring the case on for trial. Appellant's answer was filed on September 8, 1944 (99 days after Judge Bowen's decision sustaining the allegations of the libel), and appellant will not deny that thereafter and on many occasions appellees requested appellant to stipulate facts of an undisputed nature and familiar to both parties in order to expedite the final disposition of the case, save expense of trial and avoid the difficulties of taking depositions and getting together far-flung witnesses at a time when such effort was impeded, if not impossible, during wartime. It is to be noted that appellant had equal opportunity to bring the case on for trial.

On October 7, 1946, the parties *jointly* requested the case not then to be set for trial, pending the arrangement for witnesses to appear at the trial. Shortly thereafter the parties agreed on a trial date during January, 1947, and thereafter the case was continued for trial to July, 1947, on the court's own motion.

The trial began on July 16, 1947, and was completed on July 17, 1947. At the conclusion of the evidence the District Court announced its readiness to make oral findings in favor of appellees. The Court indicated that further briefs in addition to the trial briefs were unnecessary, but at appellant's insistence and request an extension of time was granted to submit briefs. (R. 222, 223, 224, 225, 226, 227.)

The mere lapse of time between a timely filing of a libel and final determination by trial of the case is no reason to refuse interest. The rule as stated in *Benedict on Admiralty* is as follows:

> "Grave unexcused delay on the part of the libelant in beginning or prosecuting the action is a discretionary ground for denying in whole or in part the award of interest." Vol. 3 *Benedict on Admiralty* (6th Edition) 193.

The record does not show nor does the appellant contend that there was any "grave unexcused delay on the part of the libelant in beginning or prosecuting the action" or that there are "peculiar facts" which would justify the Court in disallowing interest.

Furthermore, contrary to appellant's contention, the equities of the case are all in favor of appellees who advanced sums and paid losses and damages for which they have been out-of-pockett over all these years. Appellant determined to withhold payment of the claim under its policy when presented with the claim and payment thereof demanded on September 11, 1942.

Despite appellant's present contention with respect to interest, all of which it made to the trial court, the trial court after a full examination and consideration of the record including the clerk's docket entries showing the events and progress of the case concluded as a matter of right or in the exercise of sound discretion that interest was properly allowable from September 11, 1942 (R. 52)· The appellant has shown no abuse of the Court's discretion in this connection.

III. Conclusion

It is respectfully submitted that the decree of the District Court should be affirmed.

Respectfully submitted,

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